No. 142

In the Supreme Court of the United States

OCTOBER TERM, 1942

ENDICOTT JOHNSON CORPORATION, A CORPORATION, AND HOWARD A. SWARTWOOD, SECRETARY, ENDICOTT JOHNSON CORPORATION, PETITIONERS

v.

FRANCES PERKINS, SECRETARY OF LABOR OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinions of the District Court (R 55, 278) are reported in 37 F. Supp. 604 and 40 F. Supp. 254. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 298–332) is reported in 128 F. (2d) 208.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 22, 1942 (R. 333). The peti-

tion for a writ of certiorari was filed on June 11, 1942, and was granted October 12, 1942. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a district court must determine whether particular plants of a contractor subject to the Walsh-Healey Public Contracts Act are within the coverage of the Act before enforcing an administrative subpoena requiring the production of records relating to those plants.

2. Whether employees of an integrated shoe company, who work in plants in which are processed and prepared the leather soles, rubber heels, counters and cartons for use in performance of a Government contract for the manufacture of footwear, are covered by the wage and hour provisions of the Walsh-Healey Public Contracts Act.

STATUTES INVOLVED

The pertinent provisions of the Walsh-Healey Public Contracts Act, 49 Stat. 2036 (41 U. S. C. 35–45), are set forth in the Appendix, *infra*, pp. 39–46.

STATEMENT

On October 6, 1939, the Endicott Johnson Corporation was served with an administrative complaint issued by the Division of Public Contracts

of the United States Department of Labor charging that the company had violated certain provisions of the Act of June 30, 1936, 49 Stat. 2036, known as the Walsh-Healey Public Contracts Act (R. 42). On or about November 16, 1939, an amended complaint was served in the same proceeding (R. 42, 209–222), and on or about November 26, 1939, Endicott Johnson filed its answer to the amended administrative complaint (R. 42–43; 24–34). On December 7, 1939, petitioners, Endicott Johnson Corporation and Howard A. Swartwood, its Secretary, were served with subpoenas *duces tecum* issued by the Secretary of Labor, directing them to produce certain wage and hour records and books at an administrative hearing to be held on December 13, 1939, before an Examiner of the Division of Public Contracts (R. 8–9, 10–11). At the hearing petitioners refused to obey the subpoenas as to the books and records of certain of the Endicott Johnson factories (R. 6–7, 13, 43) and the administrative hearing was adjourned pending a court proceeding to enforce the subpoenas (R. 260–261).

Thereupon, on January 15, 1940, the Secretary of Labor, pursuant to Section 5 of the Walsh-Healey Public Contracts Act, began this proceeding by filing a complaint and application (R. 2–8) in the District Court of United States for the Northern District of New York to obtain an order

directing petitioners to obey the subpoenas issued in the administrative proceeding. The facts alleged in the complaint and application may be summarized as follows (R. 2–8):

Between 1936 and 1938 fifteen contracts were entered into by Endicott Johnson with various executive departments or agencies of the United States for the manufacture or furnishing of certain leather shoes, leather boots, gymnasium shoes, and arctic overshoes (R. 2–3). Each contract was for an amount exceeding $10,000, and each specifically included the representations and stipulations, required by Section 1 of the Walsh-Healey Public Contracts Act (R. 3), that the contractor would pay his employees engaged in the manufacture or furnishing of the material not less than the minimum wages as determined by the Secretary of Labor pursuant to Section 1 (b) and that those employees would not be permitted to work more than the maximum number of hours established by Section 1 (c).

On December 21, 1937, the Secretary of Labor, in accordance with and under the authority of Sections 1 (b) and 4 of the Act, determined a specific minimum wage for employees engaged in the performance of contracts with agencies of the Government for the manufacture and supply of men's welt shoes. This determination was effective with respect to contracts awarded on or after fifteen

days from December 21, 1937. (R. 3.) Three of the fifteen contracts here involved were awarded more than fifteen days after said date and were affected by the determination (R. 3).

Following an investigation by representatives of the Department of Labor, and it having appeared upon the basis of that investigation that Endicott Johnson had not observed certain provisions of the fifteen contracts and had consequently violated the Walsh-Healey Act, the Secretary of Labor, pursuant to Sections 2 and 5 of the Act, caused an amended complaint, in substitution for an original complaint, to be issued charging Endicott Johnson with breach and violation of certain representations and stipulations in the fifteen contracts, and with violation of certain provisions of the Act and the regulations promulgated thereunder. The violations charged were (1) that at eight of Endicott Johnson factories and departments (tanneries, rubber factory, sole cutting departments, counter department, and carton department) Endicott Johnson, during specified periods, permitted and required persons employed by it in the performance of the fifteen contracts to work in excess of the prescribed maximum hours without paying said employees the prescribed overtime rate for the excess hours as required by the contracts, the Act and the Secretary's regulations thereunder, and (2) that Endicott Johnson refused to pay the pre-

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scribed minimum wages to persons employed by it in four of the eight departments and factories in the performance of the three designated contracts. (R. 3-5.)

After an answer to the amended administrative complaint was filed, a hearing upon all matters in issue was commenced before a representative designated by the Secretary, after due notice had been given (R. 4-5). At the direction and order of the Secretary of Labor, subpoenas *duces tecum* were properly executed and served upon petitioners, requiring them to appear and testify at the administrative proceeding, and to bring with them certain books and records. The subpoenas called for "all time cards, time books, employees' wage statements, and payroll records showing the hours worked each day and week by, and the wages paid each wage period to, persons employed by defendant Endicott Johnson Corporation in the factories or departments and for the periods specified in said subpoenas". (R. 6.) Although all of such books, records, cards and statements were in petitioners' custody, petitioners refused to obey so much of the subpoenas as related to cards, books, statements and records covering employees in the eight factories and depart-

ments and for the periods shown in the margin (R. 6–7).[1]

The complaint and application alleges also that the Secretary has reason to believe that the persons employed during the specified periods in these eight factories and departments were employed by Endicott Johnson in the performance of the Government contracts and that the records demanded are relevant, material, and necessary to determine whether or not the company has violated the Act and breached its stipulations (R. 5).[2] It is fur-

[1] The amended administrative complaint charged violations at twelve factories and departments of Endicott Johnson (Pltf. Exh. 11, R. 209–222), and the subpoenas called for the books and records of all twelve, but there has been no refusal to obey the subpoenas as to the four factories called "footwear" factories (R. 235, 244).

Calfskin Tannery	March 22, 1937, to August 11, 1937; March 24, 1938, to June 1, 1938
Upper Leather Tannery	October 26, 1936, to September 21, 1938
Sole Leather Tannery	October 26, 1936, to October 11, 1938
Paracord Factory	
Sole Cutting Department (Endicott)	
Sole Cutting Department (Johnson City)	
Counter Department (Johnson City)	
Carton Department (Johnson City)	

[2] The amended administrative complaint alleged flatly that the persons involved were employed by Endicott Johnson in the performance of the Government contracts (R. 210, 212, 215, 216, 217, 218, 219, 220, 221). The complaint and application alleges that the administrative complaint contains these allegations, and that the Secretary has reason to believe them, but acknowledges that Endicott Johnson denies them (R. 5).

ther alleged that the Secretary of Labor is empowered to make that determination, as well as other relevant determinations, in the administrative proceeding (R. 5).

Petitioners' answer to the complaint and application (R. 11–24), as claimed by a stipulation of counsel (R. 35–36), admits the allegations as to the making and the contents of the contracts (R. 12), as to the steps taken in the administrative proceedings (R. 13), and as to the refusal to comply with the subpoenas (R. 13). It also admits that the eight factories and departments in question were those in which Endicott Johnson's employees tanned most of the leather, cut most of the leather outsoles, middle soles, and inner soles, manufactured all of the rubber heels and soles, all of the counters, and all of the cartons used by the company in the manufacture of the shoes and boots furnished under the fifteen Government contracts (R. 14–15). But the answer denies that the Secretary has reason to believe that the persons employed in these eight factories and departments were employed in the performance of the contracts, or that the records demanded were "relevant, material, and/or necessary to determine any question or matter with respect to the performance" by the company of any of its Government contracts (R. 13, 14, 35–36).

On June 26, 1940, the Secretary of Labor moved for judgment on the pleadings. In the alternative

she moved for summary judgment upon an affidavit by the Solicitor of the Labor Department, who had verified the complaint and application, supporting the allegations of the complaint. As a third alternative, she moved for an order enforcing the subpoenas. (R. 36–40.) The position of the Government was that the answer had raised no real issue as to the Secretary's "reason to believe" that the Public Contracts Act, as a matter of law and fact, covered the factories in question and that the employees had been engaged in the performance of the Government contracts (cf. R. 37–40). In this view, the court was not presently to determine the ultimate question of coverage of the Act. Petitioners, however, contended that the Act could not be construed to cover the tanneries, sole cutting, rubber, carton, and counter factories and that the court should so hold. (Cf. R. 42–55, 54.) No question was raised as to the definiteness or breadth of the subpoenas.

Over six months later, by opinion of February 1, 1941 (R. 55–59), the District Court denied the motions for judgment on the pleadings and for summary judgment on the ground that petitioners had raised an issue "partly factual and partly legal," as to whether the Act covered the eight plants, which issue must be decided by the court after a hearing, since the Secretary had not defi-

nitively determined the issue herself (R. 58).[1] The court withheld decision on the motion for an order enforcing the subpoenas until after the hearings (R. 59) 37 F. Supp. 604. An order to this effect was entered by the court on February 19, 1941 (R. 63–65), resettling on motion of the Secretary (R. 61–63) a prior order of February 10, 1941 (R. 59–61) which had included a stay of the administrative proceedings and an injunction against the Secretary.

The Secretary thereafter was permitted to amend her complaint and application by adding (1) the unqualified allegation that the employees covered by the records demanded were employed in the "manufacture and furnishing of the materials, supplies, articles and equipment used in the performance of the contracts with the United States," and (2) the allegation that "all the rubber heels and soles, all the counters, all the cartons, and substantially all the cut leather outer soles, middle soles, and inner soles, used by the defendant * * * in the performance" of the Gov-

[1] The District Court held the proceeding to be a summary one, and not governed by the Federal Rules of Civil Procedure (R. 56), and was in accord with the Secretary's contentions and the cases on the point. See *Cudahy Packing Co.* v. *National Labor Relations Board*, 117 F. (2d) 692 (C. C. A. 10th); *Goodyear Tire & Rubber Co.* v. *National Labor Relations Board*, 122 F. (2d) 450 (C. C. A. 6th); Note (1941) 8 U. of Chicago L. Rev. 592; 2 Pike & Fischer, *Federal Rules Service*, 511.

ernment contracts were "manufactured, processed, prepared and produced by persons employed by the defendant" in the eight factories involved (R. 65–66, 67). Petitioners then amended their answer to deny the first added allegation, and to deny the second "except as the same are hereinbefore admitted in this answer" (R. 68). The answer had previously admitted the substance of this allegation (R. 14–15). The Secretary thereupon renewed her motions for judgment on the pleadings and for summary judgment (R. 68).

A hearing was held on April 24 and 25, 1941 (R. 71–171). Evidence was taken, among other matters, as to the structure of Endicott Johnson's operations, the relationship of its various factories, the course of materials through the processes of manufacture, and the point at which selection of materials for use in Government contracts was made. It was brought out clearly, as the pleadings and affidavits indicated, that Endicott Johnson carries on an integrated shoe and boot manufacturing business with several factories, including tanneries, sole cutting, rubber making, counter and carton plants, within an area of a nine mile radius in south central New York. (R. 137–166; cf. R. 14, 25–26, 39.) There was, in addition, uncontradicted support for the proposition that the majority of shoes manufactured for the Government are produced by integrated companies (R. 93–94; Pl. Exs.

7 and 8 for Ident., R. 205, 207).[4] At the close of this hearing the Secretary moved for judgment on the ground that on the uncontradicted facts the employees covered by the records were within the protection of the Walsh-Healey Act (R. 168–169).

On August 19, 1941, the District Court announced its opinion denying the Secretary of Labor's application for an order enforcing the subpoenas (R. 278–283). The court apparently held that a prior determination by the Secretary that the Public Contracts Act covered the eight plants in question would bind the court, but that no such determination was made here, in which event the court could and would decide the issue of coverage for itself (R. 278, 283). The court thereupon excluded from the coverage of the Act employees "working on parts where, until after manufacture, it is impossible to determine whether the parts are suitable for use under the contract" (R. 280). The court reviewed the manufacturing process in the Endicott Johnson plants, and concluded that, in the case of each of the eight factories and departments involved, it was impossible to tell which piece of leather, sole, counter, heel, or carton would be used to make up a boot or shoe furnished under

[4] The court itself remarked: "I would expect the integrated industries would have a larger proportion of the contracts, the same as I would expect Ford, General Motors, and so on, would have the big percentage of the contracts for cars—they are the big industries" (R. 94).

Government contract until after the particular process carried on in the plants was completed and a selection made from the finished parts. Accordingly, the court characterized the process of manufacturing carried on in these plants as "manufacture for stock," which it held not to be covered by the Act. (R. 282.)[5]

A final order denying the Secretary's renewed motions for judgment on the pleadings and for summary judgment, and denying and dismissing her complaint and application was entered on October 27, 1941 (R. 283–284).

On appeal to the court below (R. 284–297)[6] the judgment of the District Court was reversed and the case remanded to the District Court with in-

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[5] In addition, the opinion seems to hold that the manufacture of cartons and the tanning and rubber-making processes are generally unrelated to the "manufacture of shoes," and that therefore a stronger burden of proof rested on the Secretary to show that the materials processed in these factories were expressly manufactured for use in Government contracts rather than for "stock." Moreover, the court held, cartons are not "materials required" under contracts calling for the manufacture of shoes and boots, and not covered by the Act at all (R. 283–284).

[6] The appeal was taken according to both the simplified procedure established by the Federal Rules of Civil Procedure (R. 284) and the former procedure (R. 284–294) out of an abundance of caution. The court below held that it is sufficient to follow the simplified procedure of the Federal Rules, even though they "may not be fully applicable to the pre-appellate stages of this type of proceeding * * *" (R. 332).

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structions to enforce the subpoenas (R. 333). In its unanimous opinion (R. 298–332) the court held that although it might have disposed of the case "on the ground that the testimony taken by the District Court amply proved the fact of coverage, as we are inclined to believe it did" (R. 301), it preferred not to rest its decision on that ground "since we hold that the District Court should have enforced the subpoenas, on the pleadings, without taking any testimony whatever" (R. 301–302).

SUMMARY OF ARGUMENT

1. The court below properly held that the district court erred in adjudicating the question whether the employees whose work records are sought are within the coverage of the Act. That question, as appears from the pleadings, is a substantial one and is for the determination of the Secretary in the administrative proceeding. The decision of the district court is in effect an interlocutory review not warranted by the statute and incompatible with sound principles of judicial administration. More than that, it serves to forestall administrative determination. In numerous analogous situations, where a court is called upon to lend its process in aid of another proceeding, the criterion employed is whether the material sought is plainly irrelevant to a lawful subject of inquiry in the principal proceeding.

Other defenses may, of course, be raised, as the circuit court of appeals recognized. But they have no bearing here. Among these are the defenses that the subpoena violates a privilege of the witness, or is unduly oppressive, or has not been issued by the officer solely empowered to do so, or has issued out of a proceeding of a kind which is not authorized to be held.

2. While we maintain that the issue of coverage is not to be decided in this case, the circuit court of appeals was right in its opinion that in any event the evidence plainly established the coverage of the employees involved. They are embraced within the statutory language as persons employed in the manufacture of articles, supplies, or materials to be used in the performance of a Government contract. This is so whether the articles manufactured be taken to include the component parts, such as soles, heels, and counters, or whether the articles manufactured are confined to the shoes which are the ultimate product. Regulations issued in 1939 specifically include the manufacturing processes in issue. A contrary interpretation would open the door to evasion of the Act. The decision of the district court rested on an erroneous view of departmental rulings concerning stock piles; it held that items are not covered by the Act until they have reached the point at which they are definitely selected for use under the Government

contract. In fact, materials in stock piles are excluded only where they have accumulated prior to the award of the Government contract. Here, again, a broader exemption would serve to defeat the purposes of the Act by permitting selection of goods to be made at the close of the manufacturing processes.

ARGUMENT

I

THE DISTRICT COURT SHOULD NOT HAVE DETERMINED IN THIS PROCEEDING WHETHER THE EMPLOYEES IN QUESTION ARE WITHIN THE COVERAGE OF THE PUBLIC CONTRACTS ACT

The petitioner corporation is admittedly subject to the Public Contracts Act in respect of the contracts here involved. The question whether employees in eight of its departments or plants are within the coverage of the Act is admittedly an issue which the Secretary of Labor was authorized to decide in the administrative hearing which was begun three years ago. That issue, it can hardly be denied, is a substantial one, turning as it does on the treatment to be given under the Act to employees of the contractor who are engaged in intermediate manufacturing processes in an integrated enterprise. It is our position that, when a district court is asked in the course of the administrative hearing to enforce a subpoena relating to the employment records of these employees, the court

should not determine for itself the ultimate issue of coverage as a condition of enforcing the subpoena. A number of important defenses to the subpoena may be raised; but this defense, requiring the court to prejudge the ultimate issue for the Secretary, is not one of them.

At the outset we disavow any contention that the function of the district court in enforcing a subpoena under Section 5 of the Act is "ministerial," or that the court is "bound to enter an order for the relief requested, regardless of any challenge thereof" (Pet. Br. 19). Such a contention is a misapprehension both of our position and of the opinion of the Circuit Court of Appeals (see R. 308–309, 328 and note 64). To an application for enforcement of a subpoena "appropriate defence may be made." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49. The application may properly be resisted on the ground that a privilege of the witness, like that against self-incrimination, would be violated. Cf. *Boyd* v. *United States*, 116 U. S. 616. Or it may be resisted on the ground that the subpoena is unduly vague or unreasonably burdensome, *Hale* v. *Henkel*, 201 U. S. 43; or that the hearing is not of the kind authorized, *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407; *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434; or that the subpoena was not issued by the person solely vested with that power, *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357. To these may be

added the ground that on the pleadings it is plain that the evidence sought is not germane to any lawful subject of inquiry in the administrative proceedings, as, for example, a demand in these proceedings for a list of the petitioner's stockholders. Thus there is ample scope in the auxiliary judicial proceeding for protection against arbitrary use of the subpoena power. Thus, by the same token, there is no issue in the present case arising from Article Three or the Fourth Amendment of the Constitution.[1]

The issue here lies in a narrower compass. Stated briefly, it is whether an application for enforcement of a subpoena for employment records of employees whose coverage under the Act is genuinely in issue in the administrative hearing shall be made the occasion for the courts to adjudicate that issue in what is essentially an interlocutory auxiliary proceeding. The decision below, holding such an adjudication to be improper, is in harmony with the statute and is compelled, we submit, by accepted principles of judicial administration.

The statute in section 5 confers power on the Secretary of Labor or his representative to hold hearings on complaint of a violation of the stipulations required by the Act. In the present case

[1] It is noteworthy that the records sought are of the kind which petitioners have, since 1938, been exhibiting to agents of another division of the Department of Labor under the Fair Labor Standards Act. See R. 311, n. 23.

the stipulations exist, a complaint was duly filed, and the hearings were begun. Section 5 empowers the Secretary or his representative to "issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath." In case of refusal of any person to obey such an order, an appropriate district court is given jurisdiction, on application of the Secretary or his representative, to issue an order requiring such person "to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; * * *." It will be observed that a standard of relevance is laid down: relevance to "the matter under investigation or in question." Here the matter is the asserted violation of the wage and hour standards with respect to certain of petitioner's employees. The merits of the controversy obviously turn on two component questions: whether these employees are covered, and whether the standards were met. Both of these component issues are, on any view, within the authority and indeed the responsibility of the Secretary to decide; and evidence relating to either of them is evidence relating to a "matter under investigation or in question." So far as relevancy is concerned, it would be unwarranted to read into these provisions anything more than that pursuit of the matter in question be not patently insubstantial. This is a criterion which, as will

be shown, is applied in other auxiliary proceedings.[4]

The essential problem is one of "judicial administration", as it was put in the *Myers* case, *supra*. The interruption of administrative proceedings for a plenary trial in court of a pending administrative issue cannot be sanctioned without violence to sound relations between judicial and administrative tribunals. If petitioners had sought to enjoin the proceedings on the ground that they were outside the province of the Secretary, the attempt would have been given short shrift. This is so, as the *Myers* case shows, even though the attack were based on plausible grounds of want of constitutional power—grounds which the present case does not even approach. If petitioners had sought to prevent the introduction in evidence by the Government of the data now sought, until a determination of the authority of the Secretary, the effort would likewise have been repulsed. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375. If the Government had sought to elicit the information by oral testimony, and the witness had refused to answer, it can scarcely be supposed that a court would have conditioned an order on a trial and decision of the issue of coverage. The circumstance that the information is in

[4] Compare also the criterion of a "substantial" federal question, for purposes of federal jurisdiction, original or appellate.

the possession of petitioner and is in documentary form does not justify a contrary result. The relations between tribunals are of too great moment to turn on whether the judicial proceeding is instituted by an objecting party or by the Government seeking statutory sanctions against a recusant party.

Our position is supported by repeated decisions concerning the function of an auxiliary court when it is asked to lend its aid pursuant to statute. Where judicial aid is sought to compel testimony or procure evidence in connection with a grand jury investigation, "witnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject-matter that is under investigation. In truth it is in the ordinary case no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not. At least, the court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction." *Blair* v. *United States*, 250 U. S. 273, 282–283. All that need be shown to compel the testimony is "relevancy to the subject of investigation." *Ibid.*; *Essgee Company* v. *United States*, 262 U. S. 151, 157; *Brown* v. *United States*, 276 U. S. 134, 143; *Wilson* v. *United States*, 221 U. S. 361, 382.

In a situation quite similar to that at bar, where judicial aid is sought to compel testimony and pro-

cure evidence in aid of a hearing in another court, the auxiliary court does not determine for itself the relevance or competence of the evidence, but only whether it is patently inadmissible. The governing canon was stated by Judge Sanborn in *Dowagiac Mfg. Co.* v. *Lochren*, 143 Fed. 211, 215 (C. C. A. 8th):

> It is not the duty of an auxiliary court or judge, within whose jurisdiction testimony is being taken in a suit pending in the court of another district, to consider or determine the competency, materiality, or relevancy of the evidence which one of the parties seeks to elicit. It is the duty of such a court or judge to compel the production of the evidence, although the judge deems it incompetent or immaterial, unless the witness or the evidence is privileged, or it clearly and affirmatively appears that the evidence cannot possibly be competent, material, or relevant and that it would be an abuse of the process of the court to compel its production. * * *

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[1] See also *Tucker* v. *Peiler*, 297 Fed. 570, 574 (C. C. A. 2d), certiorari denied, 265 U. S. 587; *Robus & Co., Inc.* v. *American Founders Corp.*, 8 F. Supp. 97 (W. D. N. Y.); *Acme Card System Co.* v. *Remington Rand Business Service*, 9 F. Supp. 1001, 1002 (W. D. N. Y.); *Belding-Corticelli Limited* v. *Kaufman*, 10 F. Supp. 991, 992 (E. D. Pa.); *Perry* v. *Rubber Tire Wheel Co.*, 138 Fed. 836, 837 (S. D. N. Y.); *Butte & B. Consol. Min. Co.* v. *Montana Ore Purchasing Co.*, 139 Fed. 843 (S. D. N. Y.); *Matter of Randall*, 90 App. Div. 192, appeal dismissed, 177 N. Y. 450.

Likewise, under the practice of discovery in aid of an action at law, the auxiliary court confines its inquiry into relevance to the pleadings in the principal action." Particularly apposite is *Sinclair Refining Co.* v. *Jenkins Co.*, 289 U. S. 689. "The remedy of discovery," it was there decided, "is as appropriate for proof of a plaintiff's damages as it is for proof of other facts essential to his case" (p. 693). The equity court will not deny the remedy and force the principal action to be decided piecemeal, with an interlocutory judgment on the issue of liability *vel non*. The integrity of the principal action will be preserved, where it was not brought "without probable cause or as an instrument of malice" (p. 697.)[11]

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[10] E. g. *Lansing B. Warner, Inc.* v. *Lehigh Valley R. Co.*, 75 F. (2d) 483 (C. C. A. 2d); *Indianapolis Amusement Co.* v. *Metro-Goldwyn-Mayer D. Corp.*, 90 F. (2d) 732 (C. C. A. 7th).

[11] Under the Federal Rules of Civil Procedure, the allowance of examinations, depositions, admissions, and subpoenas before trial is governed by similar criteria. Rule 26 (b) provides that the deponent may be "examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party * * *." Rule 30 (d) provides that the court in which the action is pending or the court in the district where the deposition is being taken may terminate or limit the examination "upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party." Under Rule 45, subpoenas may be quashed if "unreasonable and oppressive." For representative deci-

The dilemma which the Court avoided in the *Sinclair* case can be avoided here and by the same rule: that bad faith or palpable irrelevance will defeat the application. The dilemma thus avoided is the false choice between original control over the issue undecided in the principal hearing, and review of an interlocutory ruling after controlling the internal procedure in that hearing. In the present case the statute clearly does not contemplate an interlocutory judgment by the Secretary. It contemplates a single hearing, with process available for the securing of evidence appropriate to the decision of all matters fairly in issue. To require an interlocutory administrative decision on the issue of coverage of employees would, in fact, under the practice prevailing require an interlocutory administrative appeal from the trial examiner to the Administrator and then to the Secretary.[12] There could, of course, be no appeal at this point to the court; the interlocutory decision could be

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sions under these Rules, see: *Fox* v. *House*, 29 F. Supp. 673 (D. Okla.); *Berke* v. *United Paperboard Co.*, 26 F. Supp. 412 (S. D. N. Y.); *Lewis* v. *United Air Lines Transport Corp.*, 27 F. Supp. 946 (D. Conn.); *Sulzbacher* v. *Travelers Ins. Co.*, 6 Fed. Rules Serv. 36a.41 (W. D. Mo.). Where the pending suit is a bill in equity for patent infringement, the production of evidence regarding damages will ordinarily not be compelled before trial, since an interlocutory decree will be rendered. *Boysell Co.* v. *Colonial Coverlet Co.*, 29 F. Supp. 122 (E. D. Tenn.). This was explained in *Sinclair Refining Co.* v. *Jenkins Co.*, *supra*, 289 U. S. at 694.

[12] See Attorney General's Committee on Administrative Procedure, Monograph No. 1, pp. 15–22.

reviewed only collaterally if occasion arose in a subsequent subpoena proceeding arising out of the renewal of the hearings. Thus interlocutory judicial review would be superimposed on interlocutory administrative review. Such a disjointed procedure is surely not to be read into the statute in the name of sound judicial administration. Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134.

The statute contemplates judicial review of final decisions of the Secretary. Such review can be had if action is taken against, or sums withheld from, the contractor under Section 2.[13] Section 5 provides that findings of fact by the Secretary shall be conclusive in any court if supported by the preponderance of the evidence. In determining the scope of inquiry on an application to enforce a subpoena, those considerations are pertinent which have led this Court to define as narrowly as possible the concept of an appealable final judgment. *Cobbledick* v. *United States*, 309 U. S. 323. As the

[13] The Secretary also has discretionary power to place a violator on an ineligible list for three years. Section 3. The District Court for the District of Columbia has held that such action is not judicially reviewable, on the authority of *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113. *Lane Cotton Mills* v. *Perkins*, No. 8433, decided October 15, 1940. The question is irrelevant here. If a contractor has no legally protected interest in future contracts, and so no standing to complain of final blacklisting, that fact plainly does not strengthen his claim to interlocutory review. Cf. *Blair* v. *United States*, 250 U. S. 273.

three-year history of the present case demonstrates, an opportunity for full collateral determination of an issue at an interlocutory stage is an opportunity for frustrating the process of administration. Moreover, the present case is not merely one of judicial review, but of judicial control, since the Secretary had not made a decision on the issue decided by the district court. Had the Secretary attempted to revise the administrative procedure to provide for interlocutory administrative decision, the course of the proceedings might have been even more protracted.

The issue decided by the district court is of a character making judicial preemption especially inappropriate. It is an issue calling for a judgment informed by familiarity with industrial processes and with the practical workings of the Act. The issue should be decided in harmony with general regulations issued by the Secretary and consistently with determinations in analogous cases decided through the administrative process under the Act. There may also be subsidiary issues of fact on which decision turns; under the view of the district court, it becomes important to find the point in the processing of materials at which they are specifically selected for use in performing a Government contract."[11] Apart from this feature,

[11] For example, petitioner Swartwood's affidavit, in opposition to the motion for summary judgment, states that "the hides which are to be used in upper leather in Government

issues of "coverage" have produced some of the most familiar examples of judicial deference to administrative judgment. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251; *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162; *Gray* v. *Powell*, 314 U. S. 402. Here the district court did not simply substitute its judgment on such an issue for the Secretary's; the court felt constrained to forestall the Secretary's judgment.

The decision of the circuit court of appeals is in accord with others under comparable statutes. *Fleming* v. *Montgomery Ward & Co.*, 114 F. (2d) 384 (C. C. A. 7th), certiorari denied 311 U. S. 690; *Cudahy Packing Co.* v. *Fleming*, 119 F. (2d) 209 (C. C. A. 5th), reversed on other grounds, *sub. nom. Cudahy Packing Co.* v. *Holland*, 315 U. S. 357; *National Labor Relations Board* v. *Barrett Co.*, 120 F. (2d) 583 (C. C. A. 7th); *Cudahy Packing Co.* v. *Fleming*, 122 F. (2d) 1005 (C. C. A.

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shoes are not selected until approximately two-thirds of the tanning process has been completed, i. e., they have progressed to the stage of the fat liquor" (R. 49). Petitioners' witness Knickerbocker testified that the single sorting of sole leather for Government use was done in the sole-cutting plants (R. 161). Nevertheless the district court excluded the entire tanning and sole-cutting departments. Furthermore, opinions may differ as to the point when the operative "selection" is made. For instance, petitioners' witness Clark testified that three sortings were made in the Upper Leather Tannery (R. 148-151). The district court chose the last selection.

8th), reversed on other grounds, *sub nom., Cudahy Packing Co.* v. *Holland*, 315 U. S. 785; *President* v. *Skeen*, 118 F. (2d) 58 (C. C. A. 5th); *Graham* v. *Federal Tender Board No. 1*, 118 F. (2d) 8 (C. C. A. 5th); *United States* v. *Clyde S. S. Co.*, 36 F. (2d) 691 (C. C. A. 2d), certiorari denied, 281 U. S. 244; *National Labor Relations Board* v. *New England Transportation Co.*, 14 F. Supp. 497 (D. Conn.); *Fleming* v. *G & C Novelty Shoppe, Inc.*, 35 F. Supp. 829 (N. D. Ill.); *Fleming* v. *Davidson Lumber Co.*, 3 Wage Hour Rept. 526 (E. D. Mich. 1940); *National Mediation Board* v. *Virginian Ry. Co.*, Pike & Fischer, Admin. Law, 44g, 31–4 (E. D. Va., June 6, 1941); *Federal Power Commission* v. *Peoples Natural Gas Co.*, decided September 17, 1941 (D. D. C.).

The decision in *General Tobacco & Grocery Company* v. *Fleming*, 125 F. (2d) 596 (C. C. A. 6th), appears to be inconsistent, and for that reason the Government did not oppose certiorari in the present case. We submit that the decision is erroneous in directing an adjudication of coverage. It should be pointed out, however, that the court in the case cited emphasized that there was no showing by the Administrator that the company was engaged in interstate commerce and so came under the Fair Labor Standards Act. The court distinguished a number of decisions where it appeared that the company was to some extent subject to the statute in question. The present case is, of course,

of the latter sort. Nor is it clear in the *General Tobacco* case how much of a showing of coverage would have been deemed sufficient. The record as described by the court in that case disclosed only allegations on information and belief without particulars upon which to base an inference that the company was engaged in interstate commerce. In the present case it is not open to dispute that a substantial issue regarding coverage was made by the pleadings in the district court.

II

ON THE UNDISPUTED FACTS APPEARING FROM THE PLEADINGS, AND CONFIRMED BY THE EVIDENCE, THE PERSONS EMPLOYED BY PETITIONER IN THE FACTORIES AND DEPARTMENTS IN CONTROVERSY ARE WITHIN THE COVERAGE OF THE ACT

We have urged that the district court was not the proper forum in which the issue of coverage should be adjudicated. If, however, this Court should wish to consider that issue, we maintain that on the undisputed facts appearing from the pleadings, and confirmed by the evidence, the employees of petitioner in the eight plants or departments in question are within the coverage of the Act, and accordingly the judgment below may be affirmed on this ground.

It is admitted that all or most of the leather, soles, rubber heels, cartons and counters used in the shoes and boots supplied to the Government

were processed in the eight plants (R 14–15, 236–237). Thus there is no dispute about the fact that at least some of the employees in the eight plants worked on materials which entered into the shoes furnished to the Government. It is also admitted that the Government may obtain records relating to all the employees in a plant if any of them may be found to be covered.

We maintain that the employees come within Sections 1 (b) and (c) of the Act as persons "employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract." In the first place, the manufacture of the leather, soles, heels, counters and cartons is the manufacture of "materials * * * used in the performance of the contract." These various components of the finished product were all covered by elaborate specifications in the contracts, which are merely outlined in the printed record for the sake of brevity (cf. R. 172). In the second place, if the finished shoes be regarded as alone constituting the materials, supplies, articles, or equipment manufactured under the contract, the employees were engaged in the manufacture of the shoes. A contrary view might permit a contractor substantially to avoid the application of the Act by confining the final process in manufacture to a relatively insignificant one, although the [illegible]mediate processes were performed by [illegible]ployees in

other "departments." Such a result would tend to defeat the purposes of the Public Contracts Act as they were recognized by this Court in *Perkins v. Lukens Steel Corp.*, 310 U. S. 113, 127.

Our construction is confirmed by Section 1 (e) as explained in the original regulations issued by the Secretary in 1937. Section 1 (e) contains the same definition of materials, supplies, articles or equipment as is contained in Sections 1 (b) and (c). Section 1 (e), however, which requires that the manufacture be carried on under working conditions which are not insanitary or hazardous, is not limited to employees of the contractor itself. Consequently, Section 1 (e) requires its standards to be observed even where part of the manufacturing process is carried on by subcontractors. The regulations explained that while for most purposes work performed by a subcontractor who sells supplies and materials to the contractor with the Government is not covered, "The one exception to this rule is * * * under section 1 (e)." (R. 179–180.) Thus, if the soles, heels, etc., had been manufactured by another company, their manufacture would nevertheless have been within Section 1 (e). The fact that they were manufactured by the principal contractor himself services to bring them under the provisions of Sections 1 (b) and (c).

The district court's decision turns upon a point not stressed by petitioner. The court apparently

held that until the selection of a material, part, or piece for use in the performance of a Government contract is definitely made, the Public Contracts Act does not cover the process of manufacture. "The Act does not cover employees working on parts where, until after manufacture, it is impossible to determine whether the parts are suitable for use under the contract. Such employees are manufacturing for general stock as distinguished from working on contracts" (R. 280). This test does not depend upon the existence of separate factories or departments making materials to be used in assembling the final product (R. 280), or upon the practices or usage of a particular industry.[15]

This construction of the statute is, we submit, a plain misapplication of the "stock pile" ruling, adhered to from the beginning by the Act's administrators, that the Act does not apply to work on materials making up stock piles on hand at the time the Government contracts were entered into. The rationale of the ruling is that the Act should not apply retroactively to work done before the contractor was under any obligation to maintain the statutory standards. (See Rulings and Interpretations No. 2, Pl. Ex. 3-B, R. 184; Pl. Exs.

[15] With respect to practices or usages, it is to be noted that the greater part of the boots and shoes contracted for by the Government have been produced in integrated establishments like petitioner's (R. 93-94, 206-207).

4–A and 4–B for Ident., R. 186–187, 190.) The rule has never been applied to work performed on materials after the award of the contract, except as to work on materials to replenish a stock pile existing at the time of the award and then sufficient for the performance of the Government contracts.[16]

Petitioners have never contended, or made any showing, that stock sufficient for fulfillment of the contracts was on hand at the time of the award of the contracts.[17] The district court's extension of the exemption to materials wholly

[16] In his letter of February 23, 1939, to petitioner corporation (Pl. Ex. 6, R. 204), the Administrator of the Division of Public Contracts wrote:

"There is an exception to the applicability of the Act and regulations to the processing of leather and rubber, to the extent that the leather and rubber already on hand and in stock at the time the contract is awarded may be used in the production of the shoes required under the contract without any obligation on the part of the contractor to show that such leather and rubber was processed in conformity with the labor standards prescribed by the Act and regulations. Needless to say, the use of items from stock on hand at the time of the contract award must be definitely established by available records."

[17] Inspectors Stevenson and Hogue reported to the Chief of the Investigations Section of the Division of Public Contracts that Mr. Charles Johnson, an officer of the Endicott Johnson Corporation, had stated in conference with them that the company had no records to show that the leather used in the manufacture of the soles and heels, or its rubber heels and soles, were lifted from stock, but that in all probability a large portion of this leather was processed as needed, and

processed after the contracts were made is thus entirely unsupported by the administrative practice, or by the reasons for the departmental rule. The district court's construction might render the Public Contracts Act inapplicable to most of the manufacturing process of any concern simultaneously fabricating articles for the Government and for private purchasers. There is often no clear separation of work on Government contracts and private work until the final stages of manufacture, and under the theory of the district court, it could well be claimed that no process prior to the final sorting and selection of the end product is covered by the Act."

Several contentions made by petitioners remain to be noted. It is argued that administrative practice precludes the Secretary from ruling that the employees in question are covered. It is perfectly plain that under the formal rulings

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"possibly" the rubber heels and shoes were also manufactured as needed, and that the upper leather could not have been lifted from stock (Pl. Ex. 15 for Ident., R. 262, 126).

[18] The Division of Public Contracts has ruled that "If no separate records for employees engaged on Government work are maintained, all employees in the plant are presumed, until affirmative proof is presented to the contrary, to be engaged on Government work" (R. 181). This ruling is contrary in tendency to the district court's construction. Nevertheless, it might not remedy the harm caused by that interpretation of the Act. Under the district court's view, proof as to the time when final selection is made might presumably constitute "affirmative proof * * * to the contrary."

issued by the Secretary in 1939 the employees are covered. Those rulings discuss specifically the problem of the integrated establishment, and provide that the Act is applicable to those departments engaged in the manufacture or production of the materials or supplies to be incorporated into or used in the manufacture of the ultimate product to be delivered to the Government. (R. 183, 184.) Among the examples given are the processing of leather and rubber for shoes, the production of sand and gravel for use in making concrete, and the manufacture of pulp for paper to be used in performance of a Government contract (R. 184). The earlier rulings of 1937 contained no provision on the subject. Petitioners rely, however, on two letters offered in evidence by the Government as showing an earlier and different interpretation. Those letters were addressed to the International Harvester Company and the Baldwin Locomotive Works, respectively (R. 198, 189), and were signed by the Acting Administrator of the Public Contracts Act. Petitioners frankly acknowledge that the last-mentioned letter had not come to their attention (Pet. Br. 40). The letters must be read in their context as replies to inquiries by the two companies setting forth the facts. The letter from the International Harvester Company indicates that the materials in question were parts "accumulated in stock piles" (R. 200), and the

reply may therefore be taken as resting on that circumstance. If the reply, together with the reply to the Baldwin Locomotive Works, goes further, it cannot be regarded as evidencing either a sound or settled administrative practice binding on the Secretary. The Government in the district court offered to prove the administrative practice by adducing not only written interpretations but an account of oral rulings as well; this offer was rejected by the court on the ground that it was proper matter for a brief, and in fact the district court stated that it took cognizance of such practice as described in the Government's brief (R. 279, 280). Some of the relevant interpretations are summarized in the margin.[19]

Petitioners also rely on definitions of the shoe industry or of the shoe and allied industries as framed by the Census Bureau and the Wage and

[19] Examples of the administrative practice are: (1) In the case of *steel companies*, it has been held that under a contract calling for finished steel products, operations in the galvanizing plants were subject to the Act, although many if not most steel mills sublet their galvanizing; (2) Under Government contracts for the supply of *radio equipment*, it was held that all the operations of the contractor, including their tube manufacturing plants, were subject to the Act, even though most radio manufacturers do not make their own tubes; (3) In the case of Government contracts for articles of *wearing apparel*, it has repeatedly been held that all operations of the textile manufacturer under Government contracts are subject to the Act, even though not all textile mills are fully integrated; (4) In the case of Government contracts

Hour Division under the Fair Labor Standards Act. These definitions, it is to be observed, would apparently include many of the processes here in question, particularly the manufacture of soles and counters. (R. 268, 270.) More important, these definitions of "industries" are beside the point under the Public Contracts Act. The designation of an industry is made under the Act only for the purpose of determining a prevailing minimum wage; in the present case the only such determination was made for the welt-shoe industry, and although five of the contracts were awarded thereafter, only three of the contracts are claimed by the Government to be affected (R. 209–210, 247, 267). A manufacturer may be subject to the Act with respect to many processes which are not included within a single "industry" as determined for that purpose. That is, a manufacturer may be embraced within several industries if his operations are sufficiently extensive.

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for *handkerchiefs*, it was held that a bleachery operating as a part of an integrated establishment of the contractor was subject to the Act, even though it was the general practice of the industry to sublet the bleaching of the greiged goods or to dye the cloth in a finished state; (5) In the case of a Government contract for *prefabricated buildings*, it was held that a planing mill operating as an integral part of a plant was subject to the Act; (6) In the case of a Government contract for *triple superphosphate*, it was held that the production of the component chemicals in separate plants of the contractor, for use in making the final triple superphosphate in a third plant, was subject to the Act.

In any event, of course, definitions of an industry under other statutes would not be binding under the Public Contracts Act.

In short, while we maintain that the issue of coverage is not properly presented in this case and on this record, but is to be decided in the administrative proceeding on a record there made, we believe that the circuit court of appeals was right in the opinion it expressed that the testimony in the district court amply proved the fact of coverage (R. 301).

CONCLUSION

For the foregoing reasons the judgment of the circuit court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 1942.

APPENDIX

Walsh-Healey Public Contracts Act, 49 Stat. 2036 (41 U. S. C. 35–45)

AN ACT

To provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without sub-

sequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week;

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; and

(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima facie evidence of compliance with this subsection.

SEC. 2. That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided*, That no claims by employees for such payments

shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

SEC. 3. The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by this Act. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred.

SEC. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of this Act and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, without regard to the provisions of the civil-service laws but subject to the Classification Act of 1923, an administrative officer, and such attorneys and experts, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of this Act. The Secretary of Labor or his author-

ized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

SEC. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evi-

dence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

SEC. 6. Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 1 will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the appli-

cation of this Act to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected.

SEC. 7. Whenever used in this Act, the word "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

SEC. 8. The provisions of this Act shall not be construed to modify or amend title III of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved May 3, 1933 (commonly known as the Buy American Act), nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1931 (commonly known as the Bacon-Davis Act), as amended from time to time, nor the labor provisions of title II of the National Industrial Recovery Act, approved June 16, 1933, as extended, or of section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935; nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act to provide for the diversification of employment of Federal prisoners, for their training and schooling in trades and occupations, and for

other purposes", approved May 27, 1930, as amended and supplemented by the Act approved June 23, 1934.

SEC. 9. This Act shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; nor shall this Act apply to perishables, including dairy, livestock, and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in this Act shall be construed to apply to carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect or to common carriers subject to the Communications Act of 1934.

SEPARABILITY CLAUSE

SEC. 10. If any provision of this Act, or the application thereof to any persons or circumstances, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

SEC. 11. This Act shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from the effective date of this Act: *Provided, however,* That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

Approved, June 30, 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1943

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SUPREME COURT OF THE UNITED STATES.

No. 142.—October Term, 1942.

Endicott Johnson Corporation and Howard A. Swartwood, Secretary, Endicott Johnson Corporation, Petitioners, *vs.* Frances Perkins, Secretary of Labor of the United States.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 11, 1943.]

Mr. Justice Jackson delivered the opinion of the Court.

This case concerns the validity of a subpoena issued by the Secretary of Labor in administrative proceedings against the petitioner under the Walsh-Healey Public Contracts Act.[1] The petitioner successfully resisted the Secretary's petition for enforcement in the District Court,[2] whose judgment was in turn reversed by the Circuit Court of Appeals for the Second Circuit.[3] We granted certiorari because of the importance of the questions in the enforcement of the Act, and because of probable conflict with a holding of the Circuit Court of Appeals for the Sixth Circuit.[4]

The Walsh-Healey Act requires that contracts with the Government for the "manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000" shall represent and stipulate, *inter alia*, for the payment of "not less than the minimum wages as determined by the Secretary of Labor" (§ 1(b)), and that "no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess

[1] 49 Stat. 2036; 41 U. S. C. § 35-45.

The proceedings were instituted against both petitioners, the Endicott Johnson Corporation and its secretary, and both participated in the subsequent litigation. For convenience we refer to both as "the petitioner."

[2] 37 Fed. Supp. 604 and 40 Fed. Supp. 254.

[3] 128 F. 2d 208.

[4] — U. S. —; General Tobacco & Grocery Co. v. Fleming, 125 F. 2d 596.

of forty hours in any one week" (§ 1(c)); but provides that the Secretary may allow exemptions from the minimum wage provisions, and permit increases in the stipulated maximum hours on payment of wages at "not less than one and one-half times the basic hourly rate received by any employee affected." (§ 6.)

The Act provides for liquidated damages for violations of required stipulations in the contract (§ 2); and, further, that "unless the Secretary of Labor otherwise recommends" no government contract shall be awarded to the firm or subsidiaries of the firm which he finds to have defaulted in its obligation under the Act "until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred." (§ 3.)

The Secretary is directed "to administer the provisions of this Act" and empowered to "make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions." (§ 4.) And that he may the better and the more fairly discharge his functions, he is authorized to hold hearings "on complaint of a breach or violation of any representation or stipulation" and "to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. . . . In case of contumacy, failure, or refusal of any person to obey such an order," the District Court of the United States "shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof." The Secretary is directed to make "findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor . . . shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act." (§ 5.)

Pursuant to her authority under the Act, the Secretary in 1937 defined by rulings the coverage of the Act. She provided, *inter alia*, that "employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment used in the perform-

ance of the contract" might be employed overtime, at "one and one-half times the basic hourly rate or piece rate received by the employee."[5] Stipulations as to minimum wages were made to "apply only to purchases or contracts relating to such industries as have been the subject of a determination by the Secretary of Labor."[6] Thereafter, and on December 21, 1937, she made a determination of minimum wages to be paid employees "engaged in the performance of contracts . . . for the manufacture or supply of men's welt shoes."[7] On September 29, 1939, and after the completion of the contracts involved in this case, the Secretary issued rulings specifically dealing with "integrated establishments."[7]

From the pleadings in the District Court and admitted statements in affidavits filed, there appear the following facts:

Between October 26, 1936, and June 8, 1938, petitioner was awarded several contracts for boots, shoes, gymnasium shoes and arctic overshoes. Each was for an amount in excess of $10,000, and each contract included representations and stipulations in accordance with the Act and the Secretary's rulings thereunder set out above. Bids for and awards of the contracts designated the places of manufacture, and manufacture elsewhere was forbidden.[8]

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[5] Rulings and Interpretations under the Walsh-Healey Public Contracts Act, No. 1, § 4(2)(a).

[6] *Ibid.* § 4(1).

[7] Rulings and Interpretations No. 2, providing in § 1(2):

"When a contractor to whom a contract subject to the Act is awarded operates an integrated establishment which manufactures or produces materials or supplies that are incorporated into or otherwise used in the manufacture or supply of the materials, supplies, articles, or equipment called for by the contract, the Act is applicable to those departments which are engaged in the manufacture or production of the materials or supplies to be so incorporated into or used in the manufacture or processing of the ultimate product to be delivered to the Government as well as to the employees engaged in the manufacture or processing of that ultimate product. For example: The processing of the leather and rubber for the shoes supplied under Government contracts subject to the Act is within the purview of the Act and Regulations, and compliance therewith is essential."

[8] The bid stated:

"Bidders must state in space provided below names and locations of the factories where manufacture of the item bid upon will be performed. The performing of any of the work contracted for in any place other than that named in the bid is prohibited unless the same is specifically approved in advance by the Contracting Officer. If more than one place of manufacture is named, the quantity to be manufactured in each place must be given."

A typical statement in response is:

Names and locations of factories:	*Quantities*
"George F. Tabernacle" Factory (item 1).....	133,524 pairs

In the plants so specified notices required by the contract were posted,[9] and there the petitioner admitted an obligation and apparently intended to comply with the Act and contract. The violations claimed in those plants are minor, if any; petitioner offered to adjust any violation found there and it has willingly furnished complete records and information as to those plants and those employed in them. But there ended, the petitioner claims, both the investigatory power of the Secretary and its obligation to make its records available.

The Secretary did not agree, and instituted an administrative proceeding against petitioner charging violation of the stipulations in the contract by virtue of payments by petitioner of less than the minimum wages determined by her on December 21, 1937, for the "manufacture or supply of men's welt shoes", and of failure to make required additional payments for overtime work, in other and physically separate plants owned and operated by the petitioner. In those plants it manufactured parts such as counters and rubber heels, tanned leather for uppers and soles, and made cartons for packaging shoes for the Government, as well as for its civilian customers. The subpoena in question issued in this proceeding called for records chiefly relating to payrolls in such plants and as to them the petitioner refused to comply.

To obtain the compliance to the subpoena which petitioner refused, the Secretary had resort to the District Court as provided by § 5, alleging the foregoing facts and that "following an investigation by representatives of the Department of Labor, and it having appeared to the plaintiff upon the basis of such investigation that defendant" had violated these stipulations of the contracts, she commenced such proceeding; and that "plaintiff has reason to believe, and said amended (administrative) complaint alleges, that the persons employed" and alleged to have been under-

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East side of Washington Street (item 2)..... 182,256 pairs
(South of corner Susquehanna Street), Binghamton,
N. Y., (total items 1 and 2)..... 315,780 pairs

A typical notice of award stated:

For 133,524 pairs Shoes, Service; Special Type "B" with Full Middle sole and Rubber Heel; 182,256 pairs Shoes, Service, Special Type "B," with Corded Rubber Sole and Uncorded Rubber Heel.
To be manufactured at or supplied from Geo. F. Tabernacle, Binghamton, N. Y.
(Name and location of plants)

[9] Article 18(g).

paid "in its Calfskin Tannery, Upper Leather Tannery, Sole Leather Tannery, Paracord Factory, Sole Cutting Department (Johnson City), Sole Cutting Department (Endicott), Counter Department (Johnson City), and Carton Department (Johnson City) were employed by it in performance of the contracts specified," and that such allegations were denied by the answer in the administrative proceedings.

The Corporation pleaded to the District Court its ownership and management of the plants in question and that the rubber heels and soles, the counters, cartons, and all except a portion of the leather soles "used in the manufacture" of the government footwear "were manufactured" in its several separate plants or departments. It also set forth in full its answer in the administrative proceeding and reasons why it considered "arbitrary, artificial, unreasonable, discriminatory, and capricious" the ruling of the Secretary that the Act and contract applied to the plants other than those specifically named in the contracts. It denied that the payroll and similar records sought as to such plants were relevant to the determination of any matter confided to the Secretary's determination.

The District Court denied the Secretary's motion on the pleadings and accompanying affidavits for an enforcement order, overruled her contention that it was for her to decide this issue in the administrative proceeding, and set the case down for trial on the question of whether the Act and contracts under the circumstances covered the separate plants.

We think that the admitted facts left no doubt that under the statute determination of that issue was primarily the duty of the Secretary.

The Act directs the Secretary to administer its provisions. It is not an Act of general applicability to industry. It applies only to contractors who voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned by inclusion in the contract. Its purpose is to use the leverage of the Government's immense purchasing power to raise labor standards.

Congress submitted the administration of the Act to the judgment of the Secretary of Labor, not to the judgment of the courts.[10] One of her principal functions is the conclusive determination of

[10] Cf. Perkins v. Lukens Steel Co., 310 U. S. 113, and cases there cited.

questions of fact for the guidance of procurement officers in withholding awards of government contracts to those she finds to be violators for three years from the date of the breach.

The matter which the Secretary was investigating and was authorized to investigate was an alleged violation of this Act and these contracts. Her scope would include determining what employees these contracts and the Act covered. It would also include whether the payments to them were lower than the scale fixed pursuant to the Act. She could not perform her full statutory duty until she examined underpayments wherever the coverage extended, because underpayment is an indispensable, albeit not the only, element of proof of violation. It is the only basis on which she can compute liquidated damage as she is required to do, and it is necessary to find the date of the last underpayment to fix the beginning of the three-year period of disqualification for further contracts. Thus the payrolls are clearly related to the violation. Indeed, the underpayment is itself the violation under investigation.

Of course another indispensable element of violation is that the underpaid employee be included within the benefits of the Act and contracts. This, too, was a matter under investigation in the administrative proceeding. But because she sought evidence of underpayment before she made a decision on the question of coverage and alleged that she "had reason to believe" the employees in question were covered, the District Court refused to order its production, tried the issue of coverage itself, and decided it against the Secretary. This ruling would require the Secretary in order to get evidence of violation either to allege she had decided the issue of coverage before the hearing or to sever the issues for separate hearing and decision. The former would be of dubious propriety, and the latter of doubtful practicality. The Secretary is given no power to investigate mere coverage, as such, or to make findings thereon except as incident to trial of the issue of violation. No doubt she would have discretion to take up the issues of coverage for separate and earlier trial if she saw fit. Or, in a case such as the one revealed by the pleadings in this one, she might find it advisable to begin by examining the payroll, for if there were no underpayments found, the issue of coverage would be academic. On the admitted facts of the case the District Court had no authority to control her procedure or to condition enforcement of her subpoenas upon her first reaching

and announcing a decision on some of the issues in her administrative proceeding.

Nor was the District Court authorized to decide the question of coverage itself. The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act, and it was the duty of the District Court to order its production for the Secretary's consideration. The Secretary may take the same view of the evidence that the District Court did, or she may not. The consequence of the action of the District Court was to disable the Secretary from rendering a complete decision on the alleged violation as Congress had directed her to do, and that decision was stated by the Act to be conclusive as to matters of fact for purposes of the award of government contracts. Congress sought to have the procurement officers advised by the experience and discretion of the Secretary rather than of the District Court. To perform her function she must draw inferences and make findings from the same conflicting materials that the District Court considered in anticipating and foreclosing her conclusions.

The petitioner has advanced many matters that are entitled to hearing and consideration in its defense against the administrative complaint, but they are not of a kind that can be accepted as a defense against the subpoena.[11]

The subpoena power delegated by the statute as here exercised is so clearly within the limits of Congressional authority that it is not necessary to discuss the constitutional questions urged by the petitioner, and on the record before us the cases on which it relies[12] are inapplicable and do not require consideration.

Affirmed.

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[11] These relate to: the meaning of the contract and the Act as implemented by administrative rulings in existence at the time of the making and performance of the contract; the question of possible retroactive effect of Rulings and Regulations No. 2, *supra*, note 7; the nature of petitioner's business organization; and practices of procurement, manufacture, storage, consumption and distribution obtaining at petitioner's plants.

[12] Boyd v. United States, 116 U. S. 616; Interstate Commerce Commission v. Brimson, 154 U. S. 447; Harriman v. Interstate Commerce Commission, 211 U. S. 407; Ellis v. Interstate Commerce Commission, 237 U. S. 434; Federal Trade Commission v. American Tobacco Co., 264 U. S. 298.

SUPREME COURT OF THE UNITED STATES.

No. 142.—October Term, 1942.

Endicott Johnson Corporation and Howard A. Swartwood, Secretary, Endicott Johnson Corporation, Petitioners,
vs.
Frances Perkins, Secretary of Labor of the United States.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 11, 1943.]

Mr. Justice Murphy, dissenting.

Because of the varied and important responsibilities of a quasi-judicial nature that have been entrusted to administrative agencies in the regulation of our political and economic life, their activities should not be subjected to unwarranted and ill-advised intrusions by the judicial branch of the government. Yet, if they are freed of all restraint upon inquisitorial activities and are allowed uncontrolled discretion in the exercise of the sovereign power of government to invade private affairs through the use of the subpoena, to the extent required or sought in situations like the one before us and other inquiries of much broader scope, under the direction of well meaning but overzealous officials they may at times become instruments of intolerable oppression and injustice. This is not to say that the power to enforce their subpoenas should never be entrusted to administrative agencies, but thus far Congress, for unstated reasons, has not seen fit to confer such authority upon any agency which it has created.[1] So here, while the Secretary of Labor is empowered to administer the Walsh-Healey Act, to "prosecute any

[1] The disregard of subpoenas issued by some agencies is punishable by fine and imprisonment in a criminal proceeding, but apparently no federal agency has ever been given the power to punish disobedience as a contempt of its authority. (See Final Report of the Attorney General's Committee on Administrative Procedure, Appendix K.) The common method of enforcing subpoenas is to punish disregard of the subpoena as contempt of the issuing body. It has been held in some states that the power to punish for contempt cannot be conferred upon a body of a non-judicial character. See Langenberg v. Decker, 131 Ind. 471, 31 N. E. 190; In re Whitcomb, 120 Mass. 118, 21 Am. Rep. 502. Contra, In re Hayes, 200 N. C. 133, 156 S. E. 791. Compare statements in Interstate Commerce Comm. v. Brimson, 154 U. S. 447, at 485 and 489.

inquiry necessary to his functions", and "to issue orders requiring the attendance and the testimony of witnesses and the production of evidence under oath", he alone cannot compel obedience of those orders. "Jurisdiction" so to do is conferred upon the district courts of the United States and it is our immediate task to delineate the proper function of those courts in the exercise of this jurisdiction.[2] Specifically the question is: What is the duty of the courts when the witness or party claims the proceeding is without authority of law?

This Court, in recognition of the drastic nature of the subpoena power and the possibilities of severe mischief inherent in its use, has insisted that it be kept within well-defined channels. Cf. *Boyd* v. *United States*, 116 U. S. 616; *Hale* v. *Henkel*, 201 U. S. 43; *Fed. Trade Comm.* v. *Amer. Tobacco Co.*, 264 U. S. 298; *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 363. In conditioning enforcement of the Secretary's administrative subpoenas upon application therefor to a district court, Congress evidently intended to keep the instant subpoena power within limits, and clearly must have meant for the courts to perform more than a routine ministerial function in passing upon such applications. If this were not the case, it would have been much simpler to lodge the power of enforcement directly with the Secretary, or else to make disregard of his subpoenas a misdemeanor. So we have said that "appropriate defense may be made" to such an application for enforcement. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 49.

The Government concedes that the district courts are more than mere rubber stamps of the agencies in enforcing administrative subpoenas and lists as examples of appropriate defenses claims that a privilege of the witness, like that against self incrimination, would be violated;[3] or that the subpoena is unduly

[2] Section 5 of the Act provides in part: "In case of contumacy, failure, or refusal to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; . . ."

Criminal sanctions are not provided.

[3] Cf. Boyd v. United States, 116 U. S. 616.

vague or unreasonably oppressive;[4] or that the hearing is not of the kind authorized;[5] or that the subpoena was not issued by the person vested with the power;[6] or that it is plain on the pleadings that the evidence sought is not germane to any lawful subject of inquiry. But the Government insists that the issue of "coverage", i. e., whether the Act extends to plants of petitioner's establishment which manufactured materials used in making complete shoes but not named in the contracts, is not a proper ground for attack in this case. I think it is.

If petitioner is not subject to the Act as to the plants in question, the Secretary has no right to start proceedings or to require the production of records with regard to those plants. In other words, there would be no lawful subject of inquiry, and under present statutes giving the courts jurisdiction to enforce administrative subpoenas, petitioner is entitled to a judicial determination of this issue before its privacy is invaded. Cf. *Interstate Commerce Comm.* v. *Brimson*, 154 U. S. 447, 479; *Harriman* v. *Interstate Commerce Comm.*, 211 U. S. 407; *Ellis* v. *Int. Com. Comm.*, 237 U. S. 434; *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. 2d 596.

Of course, the courts should not arrogate to themselves the functions of administrative agencies. It is trite but truthful to say that administrative agencies render valuable and very necessary services in the solution of the complex governmental and economic problems of our time. In the making of investigations, the determination of policy, the collection of evidence, and its current evaluation, preparatory or incidental to administrative action, experience and special training are valuable aids. But after all, as pointed out by Gellhorn, Federal Administrative Agencies, pp. 27-29, the administrator is only an expert ex officio.[7] Just as the courts should not usurp the prerogatives of

[4] Cf. Hale v. Henkel, 201 U. S. 43; Fed. Trade Comm. v. Amer. Tobacco Co., 264 U. S. 298.

[5] Cf. Harriman v. Interstate Commerce Com., 211 U. S. 407; Ellis v. Int. Com. Comm., 237 U. S. 434.

[6] Cf. Cudahy Packing Co. v. Holland, 315 U. S. 357.

[7] "When reference is made to the 'expert administrative agency', it is surely not intended to mean that the expertness is lodged in the head or heads of the agency, or that they in their own person possess every expertise needed for the informed discharge of the manifold duties imposed upon the modern administrative organization. The administrative agency as now organized is a vehicle for bringing the judgments of numerous specially qualified officials to bear upon a single problem. . . . We must look beyond the heads to find the talents which make the agency expert in its assigned tasks. This is a central reality."

the agencies, neither should the word "administrative" and its companion "expertness" overawe them into abdicating responsibilities imposed upon them by Congress.

The legal propriety of instituting proceedings is a question which an agency is authorized if not obliged to determine, provisionally at least, before instituting the proceedings. But while the decision may be the agency's in the first place, it is not a decision which it is ordinarily more competent to make than the courts and judges, who (at least in theory) should be more qualified than administrative officers, many of whom are laymen, to determine whether a statute extends to a certain set of facts. If the preliminary determinations by an agency of the scope of its power and jurisdiction are sacrosanct, why did Congress subject their final determination to judicial scrutiny, as it has done in the Walsh-Healey Act with regard, at least, to the enforcement of the wage and hour requirements on behalf of the employees? And if the courts are qualified to pass final judgment on the "quasi-judicial" findings and conclusions of the administrators which they are ordinarily permitted to do to a greater or lesser extent,[8] they are no less qualified to determine whether the evidence which moved the administrator to enter a formal complaint is sufficient in law to show probable cause that the statute under which the administrator is proceeding covers the case. Without such a showing of probable cause, the district courts ought not to be required as a matter of mere routine to lend their aid to the proceeding by compelling obedience to the subpoena.

It is to be understood, of course, that if the matter is in doubt and if there is a reasonable legal basis for the charge, the court should not substitute its judgment on the law or the facts for that of the agency. The court's duty is to assist the agency in the performance of its functions and the discharge of its responsibilities, in the absence of a clear and convincing showing that it is proceeding without legal warrant. But it is hardly its duty to assist in the face of such a showing. So when it becomes necessary for the Secretary in the course of a proceeding under the Walsh-Healey Act to appeal to the district court for the exercise of its jurisdiction over subpoena enforcement, it is within the competence and authority of the court to inquire and satisfy itself whether there is probable legal justification for the proceed-

[8] The Walsh-Healey Act provides in § 5 that the Secretary's findings of fact shall be conclusive in any court of the United States "if supported by the preponderance of the evidence".

ing before it exercises its judicial authority to require a witness or a party to reveal his private affairs or be held in contempt.

Considerations of practical advantage and elementary justice support this conclusion. Such a rule carries out what must have been the statutory intent and would permit a timely and reasonable measure of judicial control over administrative use of the drastic subpoena power, subject to prompt review if the control were abused to the detriment of the agency. If administrative agencies may be temporarily handicapped in some instances by frivolous objections, the public will be protected in other instances against the needless burden and vexation of proceedings which may be instituted without legal justification. There is an obvious difference between the present case, wherein the district court exercises a jurisdiction expressly given to it by the statute, and those cases, such as *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, and *Newport News Co.* v. *Schauffler*, 303 U. S. 54, in which without express statutory authority a court is asked to enjoin an administrative proceeding as being contrary to law. Indeed the very difference is noted in the *Myers* case where it is said that "appropriate defense may be made" to an application for the enforcement of an administrative subpoena. 303 U. S. at 49.

Just how much of a showing of statutory coverage should be required to satisfy the district court, and just how far it should explore the question are difficult problems, to be solved best by a careful balancing of interests and the exercise of a sound and informed discretion. If the proposed examination under the subpoena or the proceeding itself would be relatively brief and of a limited scope, any doubt should ordinarily be resolved in favor of the agency's power. If it promises to be protracted and burdensome to the party, a more searching inquiry is indicated. A formal finding of coverage by the agency, which the Secretary did not make here, should be accorded some weight in the court's deliberation, unless wholly wanting in either legal or factual support, but it should not be conclusive. In short the responsibility resting upon the court in this situation is not unlike that of a committing magistrate on preliminary examination to determine whether an accused should be held for trial.

With these considerations in mind, let us turn to the facts of this case. Petitioner has willingly complied with all demands of the Secretary relating the plants of its establishment, named in the contracts, in which the shoes were manufactured. It resists

the application for enforcement of the subpoenas directing the production of records of other plants, not named in the contracts, in which some component parts for the shoes were manufactured, on the ground that the Walsh-Healey Act does not extend to those plants. It is true that petitioner voluntarily entered into the contracts with the Government, but those referred only to the specific plants where the finished product was made. And, it was not until 1939, after all the contracts were completed, that the Secretary issued rulings specifically dealing with "integrated establishments."[9] The mere fact that petitioner voluntarily contracted with reference to some plants does not necessarily mean that the Secretary is free to investigate petitioner's entire business without let or hindrance. That depends upon whether or not the Act extends to those other plants. Petitioner was entitled to have this question determined by the district court before the subpoena was enforced over its objection.

In view of the opinion of the Court there is no reason for discussing whether the district court correctly construed the scope of the Walsh-Healey Act, or whether it conducted its examination in accordance with the principles I have attempted to outline in the course of this opinion. It is enough to say that I am of opinion that under the facts of this case the district court should not be compelled mechanically to enforce the Secretary's subpoena, in the exercise of its statutory jurisdiction. It should first satisfy itself that probable cause exists for the Secretary's contention that the Act covers the plants in question.

Mr. Justice ROBERTS joins in this dissent.

[9] Rulings and Interpretations under the Walsh-Healey Public Contracts Act, No. 2.